Supreme Court, U.S.
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No.

In The

# Supreme Court of the United States

October Term, 1998

LIDDLE & ROBINSON, L.L.P.,

*Petitioner,*

*vs.*

KIDDER PEABODY & CO., INCORPORATED,

*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit*

## PETITION FOR WRIT OF CERTIORARI

JACOB A. STEIN
*Counsel of Record*
GEORGE A. FISHER
STEIN, MITCHELL & MEZINES
*Attorneys for Petitioner*
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 737-7777

149751

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

50pp

## QUESTIONS PRESENTED FOR REVIEW

I. Can an attorney for a claimant be sanctioned for invoking the aid of the state courts to ensure the fairness of an arbitration following the procedures approved by the Second Circuit Court of Appeals in *McMahon, et al. v. Shearson/American Express, Inc., et al.*, 896 F.2d 17 (2d Cir. 1990) and in this Court's decision in *Volt Information Sciences v. Leland Stanford Junior University*, 489 U.S. 468, 109 S. Ct. 1248 (1989), both of which approved the resort to interlocutory state law remedies in state courts involving pending arbitrations under the Federal Arbitration Act ("FAA")?

II. Is a Federal District Court, which has stayed an civil action in favor of arbitration under Section 3 of the FAA, empowered under the FAA to sanction a claimant's arbitration attorney (who had never previously appeared before the Court) for resorting to an interlocutory state law remedy in a state court located outside the territorial jurisdiction of the District Court where the action was originally filed?

## PARTIES TO THIS PROCEEDING

1. Kidder Peabody & Co., Incorporated
   60 Broad Street
   New York, New York 10004

   - Defendant in the District Court, Appellee on the Appeal to the United States Court of Appeals for the District of Columbia Circuit, Respondent herein.

2. Linda E. LaPrade
   4520 Bayard Boulevard
   Bethesda, Maryland 20816

   - Plaintiff in the District Court, not a party to the Appeal in the court below.

3. Liddle & Robinson, L.L.P.
   685 Third Avenue
   New York, New York 10017

   - Arbitration attorneys for Plaintiff in proceedings before the District Court, Appellant on the Appeal to the United States Court of Appeals for the District of Columbia Circuit, Petitioner herein.

Upon information and belief, Kidder Peabody & Co., Incorporated is a wholly owned subsidiary of the Kidder Peabody Group which is a wholly owned subsidiary of the General Electric Company.

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Petitioner Liddle & Robinson, L.L.P. ("Liddle & Robinson" or the "Firm") respectfully requests that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

## OPINION AND ORDERS BELOW

Judgment and Opinion filed in *Linda E. LaPrade, Liddle & Robinson, L.L.P. v. Kidder Peabody & Co., Incorporated*, __ U.S., App. D.C. __, 146 F.3d 899 (D.C. Cir. 1998) (App. A, B).

Three unreported orders entered by the United States District Court for the District of Columbia dated June 2, 1997, April 4, 1997 and December 9, 1996 in *Linda E. LaPrade v. Kidder Peabody & Co. Incorporated* (Civil Action 91-3330 (HHG)) (App. C, D, E).

The Memorandum and Order of the District Court which stayed Ms. LaPrade's civil action in favor of arbitration dated June 24, 1992 (App. F).

Two Orders dated August 24, 1998 denying a Petition for Rehearing and Suggestion for Rehearing *En Banc*, *Linda E. LaPrade, Liddle & Robinson, L.L.P. v. Kidder Peabody & Co., Incorporated* (App. G, H).

## STATEMENT OF SUPREME COURT JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The petition for a writ of certiorari seeks review of a judgment and opinion entered June 23, 1998 by the United States Court of Appeals for the District of Columbia Circuit. *See* 146 F.3d 899 (D.C. Cir. 1998).

The Court of Appeals denied petitioner's petition for rehearing and suggestion for a rehearing *en banc* by unpublished orders dated August 24, 1998.

The petition is timely. It was filed within 90 days of the denial of the petition for rehearing by the Court of Appeals. *See* Supreme Court Rule 13.3.

## STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION IN THE COURTS BELOW

The United States District Court for the District of Columbia had jurisdiction over the subject matter of this action under 28 U.S.C. § 1332.

The United States Court of Appeals for the District of Columbia Circuit had jurisdiction under 28 U.S.C. § 1291. The Court also had jurisdiction under the Collateral Order Doctrine first enunciated in *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 69 S. Ct. 1221 (1949). *See also, e.g., Martin v. Brown*, 63 F.3d 1252 (3rd Cir. 1995).

## STATUTES INVOLVED

**9 U.S.C. § 3. Stay of proceedings where issue therein referable to arbitration**

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement shall on application of one of the parties stay the trial of the

action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

**28 U.S.C. § 1927. Counsel's liability for excessive costs**

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

**New York CPLR § 7502. Applications to the court; venue; statutes of limitation; provisional remedies.**

(a) Applications to the court; venue. A special proceeding shall be used to bring before a court the first application arising out of an arbitrable controversy which is not made by motion in a pending action. The proceeding shall be brought in the court and county specified in the agreement; or, if none be specified, in a court in the county in which one of the parties resides or is doing business, or, if there is no such county, in a court in any county; or in a court in the county in which the arbitration was held. All subsequent applications shall be made by motion in the pending action or the special proceeding.

## STATEMENT OF THE CASE

This case presents the question of whether a party to an arbitration can properly invoke state remedies in a state court to insure the fairness of a pending arbitration in an action which has been stayed under § 3 of the Federal Arbitration Act.

### Background

This case involves an arbitration conducted at the National Association of Securities Dealers, Inc. ("NASD") in New York City at 33 Whitehall Street and 125 Broad Street between Linda E. LaPrade (the "Claimant") and her former employer, Kidder Peabody & Co., Incorporated ("Kidder Peabody").

An appeal was taken from a sanction award under 28 U.S.C. § 1927 against Liddle & Robinson, a New York City law firm serving as Ms. LaPrade's arbitration counsel, in the amount of $74,951.14 imposed by the United States District Court for the District of Columbia (the District where the litigation originated).

The District Court for the District of Columbia imposed the sanction because the Claimant obtained an emergency *ex parte* order from the New York State Supreme Court which temporarily stayed the arbitration pending in New York City in which two key witnesses then under subpoena[1] had announced their refusal to appear and testify at the next arbitration session and because the arbitration was otherwise in disarray.

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1. The witnesses were then resident in California and Connecticut beyond the subpoena power of the District Court.

The Claimant sought *ex parte* relief in state court[2] on the day before the arbitration panel was scheduled to reconvene because the arbitration panel suddenly had issued an order earlier that same day requiring Claimant to proceed with the hearing even though the next two witnesses, both former senior executives of Kidder Peabody represented by Kidder Peabody's counsel, would not comply with their subpoenas.

In making her application to the state court, Claimant followed a New York state procedure expressly approved by the United States Court of Appeals for the Second Circuit in *McMahon v. Shearson/American Express*, 896 F.2d 17 (2d Cir. 1990).

Following full briefing and argument, on June 23, 1998, a panel of the United States Court of Appeals for the District of Columbia Circuit filed a 15 page opinion and entered a judgment affirming the award of sanctions.

The Court of Appeals apparently based its decision largely upon the fact that the Claimant had originally sought a permanent stay of the arbitration in its petition to the State Court. 146 F.3d at page 903. That portion of the Claimant's petition, however, was promptly and voluntarily withdrawn on December 3, 1996 even before the District Court heard argument on Kidder Peabody's motion for sanctions.

Liddle & Robinson's petition for rehearing and its suggestion for rehearing *en banc*[3] were denied by orders entered August 24, 1998.

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2. The District Court had not ordered that the arbitration be held within the District of Columbia under § 4 of the FAA, and the NASD determined that New York City was the proper venue for the arbitration.

3. The court's order recites that four members of the court did not participate in the making of the *en banc* order.

The Court of Appeal's mandate issued to the District Court on September 8, 1998.

## REASONS FOR GRANTING THE WRIT

## THE PETITION FOR A WRIT OF CERTIORARI PRESENTS SUBSTANTIAL AND IMPORTANT QUESTIONS FOR REVIEW

Both this case and *McMahon* involve an award of sanctions under 28 U.S.C. § 1927. Both cases involve applications by petitioners to invoke special remedies related to arbitrations under Article 75 of the New York Civil Practice Law and Rules ("CPLR") in the New York State Supreme Court. Both cases involve a petitioner's application for a temporary stay of a pending arbitration in New York City. In both cases, petitioners brought on their special proceedings under Article 75 of the CPLR by *ex parte* orders to show cause.

Claimant's invocation of a New York state court interlocutory remedy in a collateral New York state court proceeding is the identical procedure that the Second Circuit expressly approved in the *McMahon* case. As the Second Circuit said in *McMahon*, the only conduct subject to criticism was Shearson's decision to initiate "satellite litigation" for sanctions in the district court — precisely what Kidder Peabody did here.

The Firm petitioned the New York state court for relief under the New York statute because the Federal Arbitration Act ("FAA") does not provide for any comparable interlocutory relief in a pending arbitration and because of the territorial jurisdictional constraints on the District Court for the District of Columbia.

This Court has expressly approved the invocation of special state law remedies regarding arbitrations under the FAA, so long as they are not inconsistent with the FAA. *Volt Information Sciences, Inc. v. Leland Standford, Jr. University*, 489 U.S. 468, 109 S. Ct. 1248 (1989) (*Volt* involved the invocation of a California statute in the California courts to stay an arbitration. The Supreme Court held that the FAA did not preempt the California state statute or remedy.)

The issues the Firm presents in this petition for a writ of certiorari raise significant questions about compulsory arbitrations under the FAA as well as federal district court jurisdiction to monitor and superintend arbitrations pending outside a court's geographical district. Such questions are especially important where the federal court which has stayed a civil action in favor of compulsory arbitration, as occurred here, is distant from the location where the arbitration is required to proceed.[4]

Petitioner asks this Court to interpret Section 3 of the FAA, 9 U.S.C. § 3, in a manner that would allow the parties to an arbitration, such as the arbitration here, to seek and obtain interlocutory relief from a state court where the arbitration is pending and the relief sought is not inconsistent with the FAA. Petitioner believes that such an interpretation of Section 3 of the Act by this Court would promote the fairness and justice in arbitration that this Court has said a party to an arbitration is entitled to receive. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S. Ct. 1647, 1652 (1991).

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4. Under the venue rules of the NASD, New York City, the place where Kidder Peabody was headquartered, was determined to be the venue for this arbitration even though Claimant resides in the District of Columbia metropolitan area.

## CONCLUSION

For the all of the foregoing reasons, Petitioner respectfully asks the Court to grant a writ of certiorari.

Respectfully submitted,

JACOB A. STEIN
*Counsel of Record*
GEORGE A. FISHER
STEIN, MITCHELL & MEZINES
*Attorneys for Petitioner*
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 737-7777